

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0100

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE ESTATE OF MARTIN W. HASS, DECEASED:

**CONSTANCE E. BIENEMANN,
PERSONAL REPRESENTATIVE
OF THE ESTATE OF MARTIN W. HASS,**

APPELLANT,

v.

STATE OF WISCONSIN,

RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County:
RAMONA A. GONZALEZ, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Constance Bienemann, personal representative of the estate of Martin Hass, appeals from an order on her motion to open a

judgment. Pursuant to that judgment, the Hass estate paid the State approximately \$32,600 on a claim for medical assistance reimbursement. The trial court subsequently granted Bienemann's motion for relief from the judgment, to the extent it concluded that the judgment was void. The court also found, however, that sovereign immunity prevented it from ordering reimbursement from the State. We conclude that sovereign immunity does not bar reimbursement, and therefore reverse that portion of the trial court's order.

Martin Hass died in January 1995. A few months later, the State filed a claim for almost \$32,600 against the estate for reimbursement of medical assistance paid for nursing home care provided in 1991 and 1992 to Hass's wife, since deceased. The trial court granted judgment on the claim in May 1995, and the Hass estate paid it shortly thereafter.

The claim against the estate was authorized under § 49.496(3)(a), STATS., which directs the State to pursue claims against "the estate of the surviving spouse of a recipient" of medical assistance for nursing home care. In October 1995, however, this court held that federal law prohibits the State from pursuing such claims. *DHSS v. Estate of Budney*, 197 Wis.2d 948, 951, 541 N.W.2d 245, 246 (Ct. App. 1995).

After the *Budney* ruling, Bienemann moved the court to open the judgment, to deny the State's claim, and to order reimbursement. The trial court granted the motion to open and declared the judgment on the State's claim void under *Budney*. However, the trial court also ruled that under the sovereign immunity clause of Article IV, § 27, of the Wisconsin Constitution, the court could not order reimbursement. On appeal, Bienemann seeks recovery of the

\$32,600 the State has retained despite the holding in *Budney* that precludes any right to these funds.

Sovereign immunity does not bar reimbursement in this case. The only prohibition of Article IV, § 27, of the Wisconsin Constitution provides that suits may not be brought against the State without legislative approval. Here, however, suit was brought by the State, not against it. A party responding to a State claim may seek reconsideration and review of a trial court's adverse decision by an appeals court; successful pursuit of those options does not convert the action to one against the State. *Polk County v. State Public Defender*, 188 Wis.2d 665, 675-76, 524 N.W.2d 389, 393 (1994). By analogy, a successful § 806.07, STATS., motion is not transformed into an action against the State. The State therefore has no special protection under Article IV, § 27, of the Wisconsin Constitution from the remedies otherwise available to the estate as the prevailing party in what remained, at all times, a suit by the State.

In addition to defending the trial court's immunity decision, the State argues that we should reverse its order voiding the judgment. "A respondent who seeks a modification of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding shall file a notice of cross-appeal" RULE 809.10(2)(b), STATS. The State did not file a cross-appeal and we therefore decline to review whether the court committed reversible error by voiding the judgment on the State's claim.

On remand, the trial court shall order the State to reimburse the estate's payment on the void judgment.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

